Supreme Court, U.S.
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No. 90-1704

In The

Supreme Court of the United States

October Term, 1990

JIMMIE D. OYLER, SR.,

Petitioner,

vs.

THE STATE OF KANSAS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the State of Kansas has jurisdiction to forfeit untaxed cigarettes confiscated pursuant to a search warrant from Jimmie D. Oyler, Sr.'s "Smokeshop" which is located on private property and not operated by an Indian tribe even though he is allegedly a tribal member of the Cherokee nation and his "smokeship" is allegedly located on allotted land and when he is not exempt from payment of state sales tax in violation of Kansas law, when he has been criminally convicted of illegal possession and sale of untaxed cigarettes in violation of Kansas law.

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed include:

Jimmie D. Oyler, Sr., respondent below and petitioner here.

The State of Kansas, plaintiff below and respondent here.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On January 23, 1990, the State of Kansas filed a criminal complaint charging Jimmie D. Oyler, Sr. with violations of Kansas law for the possession and sale of untaxed cigarettes pursuant to Kansas Statutes Annotated 79-3321(a) and (n) and 79-3322. Under those subsections of the Kansas Statutes, it shall be unlawful for any person:

> 79-3321(a) To possess, except as otherwise specifically provided by this act, more than 200 cigarettes without the required tax indicia being affixed as herein provided.
>
> * * *

> (n) To sell cigarettes to a retailer or at retail that do not bear Kansas Tax indicia or upon which the Kansas cigarette tax has not been paid.

The penalty provision is contained in KSA 79-3322(a):

> 79-3322. Penalties. (a) Any person who violates any of the provisions of this act, except as otherwise provided in this act, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or by both. In addition thereto any person found liable for any license or permit fee or tax imposed under the provisions of this act shall be personally liable for such license or permit fee or tax plus a penalty in an amount equal to 100% thereof.

The basis of the criminal complaint was contraband seized from Mr. Oyler's "Smokeshop" pursuant to a search warrant; specifically 8,888 cartons of cigarettes and four individual packs, none bearing tax stamps, as well as some miscellaneous currency.

On January 31, 1990, a civil forfeiture action was filed pursuant to K.S.A. 79-3323 requesting forfeiture of the untaxed cigarettes that were confiscated pursuant to the search warrant. Kansas Statutes Annotated 79-3323 provides that:

> [a]ll packages of cigarettes, in quantities of twenty (20) packages or more, not bearing indicia of tax payments as required in this act . . . all property and paraphernalia used in the retail sale of such unstamped cigarettes . . . are hereby declared to be common nuisances and contraband. . . . Any cigarettes or property constituting a common nuisance and contraband as

> herein provided may be seized . . . and shall be subject to forfeiture as provided in this act.

After a trial to the court on April 3, 1990, the Honorable Earle D. Jones found petitioner guilty of violating Kansas law in the criminal case and sentence was pronounced on that date. Mr. Oyler immediately filed a notice of appeal and the criminal conviction was affirmed on appeal.

In the forfeiture case, Jimmie D. Oyler, Sr., filed a motion to dismiss alleging that the court had no jurisdiction over him because of his claimed status as a 1/32 Cherokee Indian. The district court rejected his arguments and found that it did have jurisdiction. Subsequently, the parties each filed motions for summary judgment. The district court per the Honorable Janette Sheldon granted summary judgment for the State of Kansas in a written opinion filed on June 8, 1990, and a final order of forfeiture was entered on June 20, 1990, with the proceeds from the sale of the cigarettes to be forfeited to the Treasurer of Johnson County, Kansas.

A notice of appeal was filed on July 2, 1990 with the Kansas Court of Appeals. Their decision affirming the trial court was entered on December 21, 1990. A copy of that Memorandum Opinion is included in the Appendix of this brief.

The section of the petitioner's brief discussing reasons why this court should grant certiorari contains numerous misstatements of the facts and asserts matters which were never a part of the record in the trial court. Essentially, most of pp. 5-17 of petitioner's brief contains arguments, allegations and conclusions that are not facts

of record in this case. As such, they are not properly considered by this Court in determining whether review by certiorari is warranted.

The facts of record established that the petitioner, Jimmie D. Oyler, Sr., privately owns two acres of land which has been characterized as an allotment or is held by Mr. Oyler in some type of restricted status. On that private land Mr. Oyler owns and operates a private enterprise known as "Shawnee Jim's Indian Country Smokeshop". Mr. Oyler is 1/32 Cherokee Indian.

The Cherokee nation of Oklahoma, of which petitioner claimed membership, did not have a tobacco ordinance at the time of this action. At no time has the Cherokee Tribe lived on, or controlled, petitioner's land. It has been held in his family exclusively.

On December 2, 1989, January 13 and 20, 1990, undercover agents with the Kansas Bureau of Investigation went to petitioner's "Smokeshop" and purchased cigarettes from the petitioner that did not have the required tax indicia and the officers did not pay state sales tax on the purchases. The undercover officers are not Indians nor members of Mr. Oyler's "tribe" and petitioner never asked them if they were. Mr. Oyler never disputed that he would sell cigarettes to anyone who came into his "Smokeshop".

Mr. Oyler has never applied for, nor received a cigarette tax license. Mr. Oyler is not exempt from payment of state sales tax. The Kansas Department of Revenue criteria for exemption are based on the pronouncements of this Court in *Washington v. Confederated Tribes of Colville*

Indian Reservation, 447 U.S. 134 (1980) and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

According to the Kansas Department of Revenue, Mr. Oyler did not qualify for an exemption from payment for Kansas state sales tax because: (1) the land on which he operates his "smokeshop" is not under the control of an Indian tribe; (2) the sales of cigarettes from his "smokeshop" are not made by the tribe itself nor by a retailer approved by the tribe under regulations or ordinances adopted by tribal government; and (3) the cigarette sales by petitioner have not been restricted to members of the same tribe which controls the reservation and regulates the retailer. Sales made to non-Indians or members of other tribes are not exempt from payment of state cigarette and sales tax. Petitioner has maintained at all times that his land is exempt from all laws and that he is not subject to any state laws.

Petitioner's request for certiorari to the Kansas Supreme Court should be denied because it does not comply with any of the provisions for discretionary review by this Court.

SUMMARY OF THE ARGUMENT

Petitioner's request for review does not comply with the Rules of this Court and there is no provision for the relief petitioner is requesting. Accordingly, Respondent, State of Kansas, prays that petitioner's petition for "Writ on Certiorari to the Supreme Court of the State of Kansas" be denied in its entirety.

The facts in this case establish that the trial court presiding over the criminal matter found that it had jurisdiction over Jimmie D. Oyler, Sr., as did the trial court which presided over the civil forfeiture action. The Kansas Court of Appeals issued separate written opinions affirming both courts. The petitioner here then requested review by the Kansas Supreme Court which it summarily denied. The petitioner's brief here requests that this Court grant certiorari to the Kansas Supreme Court. No provision exists for the relief requested by the petitioner. Petitioner has not cited the appropriate jurisdictional statute to this Court and has not complied with the Rules of this Court in the preparation of his petition.

The decision of the trial court finding that it had civil jurisdiction over petitioner is firmly anchored in pertinent decisions of this Court, from *California State Board of Equalization v. Chemchuevi Indian Tribe*, 474 U.S. 9 (1985), *reh. denied*, 474 U.S. 1077 (1986), *cert. denied*, 481 U.S. 1051, (1987); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), and this Court's most recent decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 59 U.S.L.W. 4137 (U.S. Feb. 26, 1991).

Based on the foregoing, the petitioner's request for review should be summarily denied.

ARGUMENT FOR DENYING THE PETITION

I. The petitioner's request for review should be denied.

A. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for this Court's jurisdiction.

This petitioner's request for review by certiorari should be dismissed. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for the Court's jurisdiction. This is not the appropriate statute. No federal circuit court of appeals has ever been involved in this case and, as such, 28 U.S.C. 1254(1) is not applicable.

B. The burden is on the petitioner to show affirmatively that the Supreme Court has jurisdiction, a burden which the petitioner has failed to sustain in this case.

The party requesting review by this Court must affirmatively show that the Court has jurisdiction. *See e.g., Dept. of Dental Hygiene of California v. Kirchner*, 380 U.S. 194 (1965), *on remand*, 43 Cal. Rptr. 329, 400 P.2d 321 (1965). It must affirmatively appear that a federal question was actually decided. The petitioner has failed to sustain this burden.

C. Petitioner has not complied with the Rules of this Court.

An application to the United States Supreme Court for writ of certiorari to review the judgment of a state court must be made in the manner prescribed by statute and the Rules of the Supreme Court. The petition for

review in this case does not comply with applicable statutes nor with the Rules of this Court.

1. The petitioner has not complied with Rule 10.1(b) or (c) because the highest court in Kansas has not addressed the jurisdiction issue on its merits.

The highest court in Kansas, the Kansas Supreme Court, has not addressed the issue of jurisdiction over Mr. Oyler, which is the issue petitioner is presumably asking this Court to review. Further, the Kansas Supreme Court has never decided a federal question in a way which conflicts with the decision of another state court of last resort or of a United States Court of Appeals, a circumstance which is contemplated by Rule 10.1(b) before this Court will entertain discretionary review. Additionally, the decision of the trial court does not conflict with applicable decisions of this Court. Rule 10.1(c).

2. Petitioner's request for review should be denied for lack of clarity and specifically in violations of Rules 14.1 and 14.5.

Review by this Court on writ of certiorari is not a matter of right, but of discretion. Rule 10.1. Such a petition should be granted only when there are special and important reasons therefor. The petitioner has provided no special nor important reasons to the Court. The petitioner's request should also be denied for a violation of Rule 14.1, subsections (e), (g), (h), (j), and Rule 14.5.

It is not at all clear from the petition what is being requested. The petitioner has entitled his brief as a "Petition on Writ of Certiorari to the Supreme Court of the State of Kansas," yet on page 1 of his brief he requests that this Court review the opinion and judgment of the Kansas Supreme Court of March 13, 1991, denying his Motion for review. The petitioner appears to argue in his brief, however, that this Court should review the decision of the Kansas Court of Appeals affirming the forfeiture. Petitioner has not concisely nor specifically set out what relief he is requesting from this Court, nor the legal basis on which the Court could grant that relief. No opinion was ever issued by the Kansas Supreme Court and the Court never addressed the issue of jurisdiction; it simply denied petitioner's request to review the decision of the Kansas Court of Appeals which affirmed the trial court's finding of jurisdiction.

Accordingly, and pursuant to Rule 14.5 of this Court, the petition should be summarily denied because the petitioner's brief has failed to set forth with accuracy, brevity and clearness the essential facts necessary for this Court to consider. The Rule states that this alone is a sufficient reason for denying the petition for review.

D. The decision of the Kansas State District Court finding jurisdiction was based on the decisions of this Court.

The issue of whether states can validly tax sales of cigarettes from Indian "smokeshops" has been reviewed by this Court on several occasions. The petitioner in this case has consistently ignored those decisions. This Court

has consistently held that a state has the right to require an Indian retailer to collect excise tax on cigarettes sold by a tribe to non-Indian purchasers. *See, e.g., California State Board of Equalization v. Chemchuevi Indian Tribe*, 474 U.S. 9 (1985), *reh. denied*, 474 U.S. 1077 (1986); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). The decisions in these cases were considered by the trial court in finding that it had jurisdiction over petitioner.

The Court's recent decision in *Oklahoma Tax Comm'n v. Citizen's Band Potawatomi Indian Tribe of Oklahoma*, 59 U.S.L.W. 4137 (U.S. Feb. 26, 1991), held that even a tribe's sovereign immunity does not prevent a State from exercising its authority to collect tax on sales of cigarettes to nonmembers and that the tribe has an obligation to assist states in the collection of the tax. In the case presently before the Court, the petitioner's "smokeshop" is a private enterprise, owned and operated by him on private property and not associated with any Indian tribe, although he claims to be a member of the "Cherokee Nation." He would sell cigarettes to whomever would walk in the door. He would never inquire if the purchaser was an Indian.

Counsel for petitioner has often cited *The Kansas Indians (Blue Jacket v. The Board of Commissioners of the County of Johnson)*, 72 U.S. (5 Wall) 737 (1867), as authority for his position, yet that case dealt with the *ad valorem* taking of Indian lands which is not at all at issue here.

E. Petitioner's earlier request for Review by Certiorari was Denied by the Court.

In July, 1990, petitioner filed a "Petition on writ of certiorari to the Supreme Court of the State of Kansas" requesting that this Court review the decision of the Kansas District Court in the criminal case that it had jurisdiction over him. That request for review was denied by this Court. The instant petition for review is, in essence, the same document which was filed before but specifically requests review of the decision of the Court which ruled that it has civil jurisdiction over him in the forfeiture proceeding. No new authority, nor reasons for the granting of petitioner's request for review have been advanced.

CONCLUSION

For the reasons articulated above, Respondent, State of Kansas, respectfully requests this Honorable Court to deny Mr. Oyler's petition for writ of certiorari in its entirety.

Respectfully submitted,

MELINDA SWANSON WHITMAN
Counsel of Record for
Respondent, State of Kansas

APPENDIX

No. 65,417

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Appellee

v.

JIMMIE D. OYLER, SR.,
Appellant.

SYLLABUS BY THE COURT

1.

The State's jurisdiction in a forfeiture proceeding is not derived from civil jurisdiction over the person of the defendant but is based on in rem proceedings against the goods seized as contraband.

2.

Where the State of Kansas possesses criminal jurisdiction over a defendant for violation of the Kansas cigarette tax and sales tax laws, it has in rem jurisdiction to proceed with the forfeiture of contraband seized from the defendant at the time of his arrest.

Appeal from Johnson District Court; JANETTE SHELDON, judge. Opinion filed December 21, 1990. Affirmed.

Pamela S. Thompson, of Horton, for the appellant.

Melinda S. Whitman, assistant district attorney, Paul J. Morrison, district attorney, and Robert T. Stephan, attorney general, for the appellee.

Before LARSON, P.J., DAVIS, J., AND RICHARD W. WAHL, District Judge Retired, assigned.

DAVIS, J.,: The defendant, Jimmie D. Oyler, Sr., appeals the forfeiture of cigarettes and money seized by the State of Kansas at the time of his arrest. He contends that the State of Kansas lacks civil jurisdiction to proceed with a forfeiture action because he is a Cherokee Indian and because his smokeshop is located on Indian land.

Jimmie D. Oyler, Sr., owns and operates Shawnee Jim's Indian Country Smokeshop (Smokeshop) located in rural Johnson County, Kansas. Oyler is an enrolled member of the Cherokee Nation. The Smokeshop is on Shawnee Reserve 206 which Oyler claims is Indian land.

The Kansas Department of Revenue determined that Oyler was not eligible to possess or sell cigarettes without Kansas tax stamps and denied his request for permission to allow a wholesaler to sell untaxed cigarettes to him. In August 1988, the Kansas Director of Taxation notified Oyler that he was violating Kansas law for selling non-taxed cigarettes from his Smokeshop and ordered Oyler to cease and desist.

On December 2, 1989, Kansas Bureau of Investigation Special Agents Nathan Yonally and Richard Marchewka, working undercover, entered the defendant's Smokeshop and purchased three cartons of cigarettes. None of the cigarette packages had Kansas tax stamps on them and Agent Yonally did not pay sales tax. The defendant did not ask the agent if he was an Indian.

The defendant was tried and convicted on three counts of possession of more than 200 cigarettes without

the required tax indica (K.S.A. 79-3321) and three counts of selling cigarettes at retail that did not bear the Kansas tax indica (K.S.A. 79-3321). We affirmed the defendant's conviction in *State v. Oyler*, 15 Kan. App. 2d ___, ___ P.2d ___ (No. 65,061, filed December 21, 1990).

At the time of the defendant's arrest, 8,888 cartons of cigarettes, money from cigarette sales, and records concerning sale of cigarettes were seized. An order to show cause why the seized property should not be forfeited was filed. The defendant's motion to dismiss for lack of subject matter jurisdiction was denied without opinion by the trial court. The cigarettes seized were ordered forfeited as contraband and sold, and the proceeds from the sale were placed with the Johnson County District Court. Defendant appeals from the trial court's grant of the State's motion for summary judgment on the issue of forfeiture.

The facts are not in dispute. The sole issue raised by the defendant involves his contention that the State of Kansas lacks jurisdiction to proceed with forfeiture because he is a Cherokee Indian and his Smokeshop is on Indian land. In *State v. Oyler*, 15 Kan. App. 2d ___, we held that the State of Kansas possessed criminal jurisdiction over Jimmie D. Oyler, Sr., under the provisions of 18 U.S.C. 3243 (1988). Based on its exercise of criminal jurisdiction over the defendant, the State at the time of defendant's arrest seized the property in question as contraband. K.S.A. 79-3323 defines contraband as it relates to this case as "[a]ll packages of cigarettes, in quantities of twenty (20) packages or more, not bearing indica of tax payment as required in this act."

Forfeiture actions are proceedings in rem:

> "Forfeiture statutes are premised on the notion that the thing to be forfeited has itself offended society, either because it is contraband or has been used to violate laws deemed of special social importance. [Citation omitted.] . . . Although enforced through proceedings in rem, forfeitures are penal in nature. [Citation omitted.]" *State v. One 1987 Chevrolet corvette*, 8 Kan. App. 2d 747, 749-750, 667 P.2d 893 (1983).

The State's jurisdiction in this case is not derived from civil jurisdiction over the person of the defendant but is based on in rem proceedings against the goods seized as contraband.

Moreover, the forfeiture in this case is penal in nature. The State of Kansas possessed criminal jurisdiction over the defendant for violation of the Kansas cigarette tax and sales tax laws. *State v. Oyler*, 15 Kan. 2d ___. It is from the criminal action and seizure of contraband that the State of Kansas has jurisdiction to proceed in rem with the forfeiture of the contraband. It also follows that the State of Kansas possesses jurisdiction over the defendant due to the penal nature of the forfeiture under the provisions of 18 U.S.C. 3243.

Having concluded that criminal jurisdiction was conferred upon the State of Kansas by the provisions of 18 U.S.C. 3243, it becomes unnecessary to determine whether the State of Kansas has civil jurisdiction over the defendant. We acknowledge that neither Kansas nor the United States Congress has acted to assume civil jurisdiction over Indians in the State of Kansas. However, contrary to the defendant's contention, such legislation is not

necessary in this case because the State of Kansas properly assumed criminal jurisdiction over the defendant which was sufficient to support the in rem forfeiture action.

Affirmed.

COURT OF APPEALS ORDER

DISTRICT CASE NO. 90C1293

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

MELINDA S. WHITMAN
ASSISTANT DISTRICT ATTORNEY
JOHNSON COUNTY COURTHOUSE
P. O. BOX 728
OLATHE KS 66061

STATE OF KANSAS, APPELLEE,
V
JIM D. OYLER, SR., APPELLANT.

NO. 90-65417-A

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN IN THE ABOVE ENTITLED CASE:

PETITION FOR REVIEW - OYLER.
CONSIDERED BY THE COURT AND DENIED.

DATE: 03/13/91.

YOURS VERY TRULY,
LEWIS C. CARTER
CLERK, SUPREME COURT